U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 July 2007

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In the Matter of:

D.S., widow of and on behalf of
R.S., deceased,
Claimant,
v. Case Nos.: **2005-BLA-06090**
2005-BLA-06091

BOB & ROD COAL COMPANY/
OLD REPUBLIC INSURANCE COMPANY,
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.
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Appearances:

Monica Rice Smith, Esq., Edmond Collett, PSC, Hyden, KY
For the Claimant

Gayle G. Huff, Esq., Huff Law Offices, Harlan, KY
For the Employer

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding encompasses two claims under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*. ["Act"] – (1) a claim for survivor's benefits brought by the Claimant D.S. ("Claimant") based upon the death of her husband, deceased coal miner R.S. ("Miner") (Case No. 2005-BLA-06090) ("Widow's claim"); and (2) a claim for benefits brought by the Miner during his lifetime, that was pending at the time of his death (Case No. 2005-BLA-06091) ("Miner's claim"). The putative responsible operator is Bob & Rod Coal Company ("Employer") which is insured through Old Republic Insurance Co. ("Carrier.")

Part 718 of title 20 of the Code of Federal Regulations is applicable to these claims, as they were filed after March 31, 1980, and the regulations amended as of December 20, 2000 are

applicable, as these claims were filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003 for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record relating to each case, including all evidence admitted and arguments made by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

A claim for Black Lung benefits was brought by the Miner on April 22, 1980 (MDX 1).[3] Following a hearing held on September 25, 1985 in Pineville, Kentucky (Case No. 1983-BLA-01786), Administrative Law Judge Daniel Roketenetz denied the claim in a "Decision and Order – Denial of Benefits" dated January 11, 1986. *Id.* Judge Roketenetz noted the stipulation of the parties that the Miner had worked at least 15 years in coal mine employment but found 16 1/2 years established; he also found that Employer had been properly named as responsible operator. *Id.* Judge Roketenetz found simple pneumoconiosis established based upon the x-ray evidence and found (under the section 718.203(b) presumption) that it was attributable to his coal mine employment; however, he denied the claim based upon the Miner's failure to establish total disability. *Id.* The Benefits Review Board affirmed Judge Roketenetz' decision in a Decision and Order of August 31, 1988. *Id.*

The Miner's second claim, now before me, was filed on November 29, 2001 ("Miner's claim"). (MDX 3). The district director denied the claim in a Proposed Decision and Order of January 13, 2003. (MDX 24). The denial was premised upon failure to establish pneumoconiosis, that the disease was caused at least in part by coal mine work, or that the disease caused a breathing impairment of sufficient degree to establish total disability within the meaning of the Act and regulations. *Id.* After referral of the case to the Office of Administrative Law Judges, a hearing was held before Administrative Law Judge Linda Chapman on October 24, 2003. (MDX 51). However, by Order of Remand of February 27, 2004, in view of the Miner's death, Judge Chapman remanded the case to the district director for consolidation with the claim to be filed by his widow (Claimant). (MDX 57). The district director's office, on its own motion, denied modification in a "Proposed Decision and Order Denying Request for Modification" of July 18, 2005. (MDX 58). Although finding pneumoconiosis and causal relationship established, the district director's office did not find total disability established and

[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[3] Director's Exhibits from the Miner's claim will be referenced as "MDX" followed by the exhibit number. Director's Exhibits from the Widow's claim will be referenced as "WDX" followed by the exhibit number. Claimant's Exhibits and Employer's Exhibits for both claims will be referenced as "CX" and "EX", respectively, followed by the exhibit number. References to the March 29, 2006 hearing transcript will appear as "Tr." followed by the page number.

denied modification.[4] *Id.* The Miner's case was transmitted for a hearing on July 18, 2005. (MDX 59).

Claimant's claim for survivor's benefits ("Widow's claim") was filed on May 7, 2004, based upon the Miner's November 20, 2003 death at the age of 68; she indicated that an autopsy had been performed. (WDX 2). On September 8, 2004, the district director's office issued a Schedule for the Submission of Additional Evidence which found, based upon the evidence then of record, that the Claimant would not be entitled to benefits if a decision were issued at that time and the Employer was the responsible operator liable for the payment of any benefits. (WDX 16). On March 11, 2005, the district director's office denied the claim because, although the evidence established the Miner had pneumoconiosis and the disease was caused at least in part by coal mine work, the evidence did not show that the disease caused the Miner's death. (DX 22). The Widow's claim was transmitted for a hearing on July 18, 2005. (WDX 32).

A hearing was held before the undersigned administrative law judge on March 29, 2006 in Abingdon, Virginia. The Claimant did not appear but the parties agreed to take her testimony by deposition. (Tr. 5). Both parties submitted evidence designation forms and the Employer submitted a Prehearing report that summarized the evidence.[5] At the hearing, Director's Exhibits 1 through 34 for the Widow's claim ("WDX 1" through "WDX 34"); Director's Exhibits 1 through 8 and 10 through 61 for the Miner's claim ("MDX 1" through "MDX 8" and "MDX 10" through "MDX 16"); Claimant's Exhibits 1 through 3 ("CX 1" through "CX 3"); and Employer's Exhibits 1 through 3 ("EX 1" through "EX 3") were admitted into evidence.(Tr. 5-7, 12-14). The x-ray report of Dr. Baker appearing as "MDX 9" was excluded by the district director and I also excluded it because the film was not made available to the Employer. (Tr. 7). At the conclusion of the hearing, the record was kept open for a period of 60 days for the Claimant's deposition to be taken and the transcript submitted, with briefs or written closing arguments due to be filed 30 days thereafter. (Tr. 15-16).

A review of Director's Exhibit 9 for the Miner's claim (MDX 9) reveals that it includes a report of Dr. Baker, pulmonary function testing, and arterial blood gases from the December 5, 2001 examination, in addition to the excluded x-ray. The report and associated testing have been designated by Claimant for both the Miner's claim and the Widow's claim. The report may be considered to the extent not inextricably intertwined with the x-ray and, of course, the PFTs and ABGs are admissible. It is worth noting that Judge Chapman admitted Director's Exhibit 9 at the hearing before her relating to the Miner's claim but excluded the interpretation by Dr. Baker appearing in that exhibit. (MDX 54). I agree with Judge Chapman's ruling. Accordingly, my ruling is modified and MDX 9 is ADMITTED into evidence in both claims but the x-ray reading appearing therein is STRICKEN. **SO ORDERED**.

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[4] In so doing, the district director's office incorrectly stated that at the district director level, pneumoconiosis had been established. (MDX 58). Although the Schedule for Submission of Additional Evidence noted that pneumoconiosis and causal relationship had been established, the Proposed Decision and Order found that pneumoconiosis, causal relationship, and total disability had not been established. (MDX 20). Thus, the district director arguably found a basis for modification based upon the district director's earlier decision.

[5] Employer filed separate evidence designations for each case while Claimant filed a single designation for the Widow's claim and referenced a previously filed designation (MDX 48) for the Miner's claim. (Tr. 13).

On September 5, 2006, Employer filed its Brief accompanied by a copy of the Claimant's May 12, 2006 deposition transcript, which I have marked as Administrative Law Judge Exhibit 1 ("ALJ 1"). Counsel explained that the deposition had been taken but the transcript had apparently not been submitted. No brief or written closing argument was filed by Claimant. Accordingly, ALJ 1 is now ADMITTED into evidence and the record is closed. **SO ORDERED.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues for resolution (as listed on the CM-1025 transmittal form for the Miner's claim, as modified at the hearing) are length of employment, pneumoconiosis, causal relationship with coal mine employment, total disability, causation of total disability, dependency, responsible operator, modification, and subsequent claims, as well as issues listed for appellate purposes.[6] (MDX 59, Tr. 9-10). At the hearing, Employer withdrew the issues of miner, post-1969 employment, timeliness, and insurance. (Tr. 9-10).

The issue of modification was listed by the district director, but it appears that the district director sua sponte considered modification (under 20 C.F.R. § 725.310) on remand and merely reiterated his previous findings after considering the autopsy evidence. No formal modification proceedings were conducted and the parties were not advised of their right to submit additional evidence at the district director level (although they were given an opportunity to do so before me). The case had been remanded to the district director before a decision was made on the appeal, so the modification would relate to the district director's denial of January 13, 2003, based upon the Miner's failure to establish total disability. (DX 23). Although on remand, the Claimant indicated that she wished to have the death certificate and autopsy report considered in the Miner's claim and the cases consolidated, the district director, while referencing the autopsy report in his decision, did not include those items in the file relating to the Miner's claim. (MDX 56. 57, 58). Accordingly, I will consider the autopsy report (WDX 7) and death certificate (WDX 6) in making a decision on the Miner's claim, to the extent pertinent.

There is also a threshold issue of subsequent claims under section 725.309, in that the Miner's claim was finally denied by the Benefits Review Board on August 31, 1988 and that denial became final. As the current claim was filed on November 29, 2001, more than one year (in fact, more than one decade) later, it cannot be deemed to be a modification request and the requirements of section 725.309 must be satisfied. Under the section as amended, Claimant must show that one of the conditions of entitlement has changed since the date upon which the order denying the prior claim became final and, for purposes of the section, the applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. 20 C.F.R. § 725.309(d).

The issues for resolution (as listed on the CM-1025 transmittal form for the Widow's claim, as modified at the hearing) are length of employment, pneumoconiosis, causal relationship

[6] Although issues were raised for appellate purposes before the district director, they were erroneously not listed on the transmittal form CM-1025 although they were listed in the previous form (MDX 28, 59).

with coal mine employment, causation of death, dependency, and responsible operator, as well as issues listed for appellate purposes. (WDX 42, Tr. 8). At the hearing, Employer also withdrew the issues of miner, post-1969 employment, timeliness, and insurance. (Tr. 9-10).

With respect to length of coal mine employment, the Employer stipulated to 11 years of coal mine employment found by the Director and the Claimant accepted that stipulation (Tr. 7; WDX 27, 32; MDX 20, 23). The Miner alleged 18 years, of which seven years were underground and eleven were above ground. (DX 51 at 21). However, Judge Roketenetz found 16 1/2 years of coal mine employment and Employer previously stipulated to 15 years and has stated no basis for withdrawing its previous stipulation. I agree with Judge Roketenetz' finding of 16 1/2 years, which is the law of the case in the Miner's claim. Judge Roketenetz also found ten pack years of cigarette smoking (DX 1) and based upon the Miner's testimony before Judge Chapman, to the effect that he smoked for eight to ten years but had quit smoking over 30 years before (DX 21 at p. 29), that estimate is still accurate.

It is also worth noting that responsible operator was not a contested issue before Judge Roketenetz (MDX 1), and Employer has stated no basis for now raising it. In any event, based upon the evidence of record, I find that Employer was properly named as responsible operator.

DISCUSSION AND ANALYSIS

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), citing 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id.*, citing 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id.*, citing 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id.,* citing 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be

admitted into the hearing record in the absence of good cause." *Id.,* citing 20 C.F.R. §725.456(b)(1).

The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.*, 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; see 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Second, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. Third, the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records did not fall within the exceptions for hospitalization or treatment records or for evidence from prior federal black lung claims. *Dempsey* at 5. Fourth, on the issue of good cause for waiver of the regulations, the Board noted that a finding of relevancy would not constitute good cause and therefore records in excess of the limitations offered on that basis, and on the basis that the excluded evidence would be "helpful and necessary" for the reviewing physicians to make an accurate diagnosis, were properly excluded. *Dempsey* at 6. Finally, the Board stated that inasmuch as the regulations do not specify what is to be done with a medical report that references inadmissible evidence, it was not an abuse of discretion to decline to consider an opinion that was "inextricably intertwined" with excluded evidence. *Dempsey* at 9. Referencing *Peabody Coal Co. v. Durbin*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), the Board acknowledged that it was adopting a rule contrary to the common law rule allowing inadmissible evidence to be considered by a medical expert, because "[t]he revised regulations limit the scope of expert testimony to admissible evidence." *Dempsey* at 9-11.

As the Board noted in *Dempsey*, the regulations specifically allow evidence from a prior claim to be considered in connection with a later claim, so that a determination may be made whether there has been a material change in conditions since the time of the prior claim, 20 C.F.R. §725.309(d)(1); however, there is no such provision applicable to survivor's claims that would allow consideration of the evidence developed in the miner's claims, absent a finding of good cause. Consistent with the above limitations and the Board's decision in *Dempsey,* other administrative law judges have generally excluded evidence developed in connection with a miner's claim from consideration in a surviving spouse's claim to the extent that the limitations have been exceeded, unless the case involves a consolidated miner's claim and survivor's claim. However, in *Keener v. Peerless Eagle Co.*, BRB No. 05-1008 BLA (BRB Jan. 30, 2007) (en banc), the Board held that even if the cases are consolidated, there should be separate records for a miner's claim and a survivor's claim. In *Keener,* the Board also found that an autopsy rebuttal should be confined to a slide review.

The evidence in the instant case is in compliance with the evidentiary limitations. Claimant submitted a designation before me relating to the Widow's claim; Claimant's designation for the Miner's claim appears at DX 48 (Tr. 13). Employer filed two separate designations for the Miner's and Widow's claims. It is also worth noting that evidence from the Miner's closed claim (MDX 1), while automatically a part of the Miner's claim, cannot be considered with respect to the Widow's claim absent designation in compliance with the evidentiary limitations. I will address the issues in each claim separately based upon the evidence relating to that claim. The Claimant's Exhibits and Employer's Exhibits, and the single Administrative Law Judge's Exhibit, will be considered in both claims, and, as discussed above, MDX 9 (except for the stricken x-ray) will be considered in the Widow's claim and WDX 6 and WDX 7 will be considered in the Miner's claim to the extent relevant.

Miner's Claim

As noted above, the Miner's claim involves two threshold issues (1) whether there has been a change in conditions or mistake in determination of fact based upon the evidence since the time of the district director's initial denial of the Miner's claim (prior to his death) so as to give rise to modification under 20 C.F.R. §725.310; and (2) whether there has been a change in one of the conditions of entitlement upon which Judge Roketenetz denied the claim (as affirmed by the Benefits Review Board) so as to provide a basis for reopening this subsequent claim under 20 C.F.R. §725.309(d). If there is no basis for reopening this subsequent claim, it must be denied based upon the previous denial under section 725.309. The prior claim was denied for failure to establish total disability (MDX 1); however, the current claim was denied by the district director's office based upon failure to establish pneumoconiosis, causal relationship, or total disability (MDX 58). If Claimant can now establish that the Miner became totally disabled based upon the new evidence, she will have established a change in a condition of entitlement and the Miner's claim will be reopened for a consideration on its merits. *See* 20 C.F.R. §725.309(d). Such a finding would also establish a basis for modification, so that issue is essentially subsumed in the subsequent claims issue.

Subsequent Claims Issue

The amended regulations have replaced the previous material-change-in-conditions standard (relating to "duplicate" claims) with the following standard (pertinent to "subsequent" claims):

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed**

> **since the date upon which the order denying the prior claim became final.**[7] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
> (2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
> (3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, **any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.** . . .[Emphasis added.]

20 C.F.R. §725.309(d). Thus, it is necessary to look at the new evidence relating to the medical condition of entitlement upon which the prior denial was premised (here, total disability) to determine whether it establishes that condition of entitlement. If Claimant can now establish that the Miner was totally disabled based upon the new evidence, she will have established a change in a condition of entitlement and the Miner's claim will be reopened for a consideration on its merits. *See* 20 C.F.R. §725.309(d).

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence. In order to establish a basis for reopening this claim and considering it on the merits, Claimant must therefore establish total disability based upon a preponderance of the new evidence submitted in connection with this subsequent claim.

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[7] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

New Evidence on Total Disability

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5). The miner's job description must be considered in light of the medical evidence.

In considering the medical evidence on the total disability issue, I note that the Miner's last coal mine employment of more than one cumulative year was working for Employer from 1974 to 1977 at a strip mine, running a dozer, high lift, and grader; sometimes driving a truck; and sometimes loading a coal truck. (MDX 51 at 20-21; MDX 1). In the form describing his coal mine employment, he did not indicate that the job required any significant lifting or carrying. (MDX 6). He left coal mining in 1977 because of rheumatoid arthritis. (MDX 51 at 22). The Miner's coal mine employment was primarily in Kentucky. (MDX 51; MDX 1).

Pulmonary Function Tests. Under subparagraph (i), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if, in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%.

The following PFT values were produced in conjunction with the current claim (pre and, where applicable, post bronchodilator), none of which were qualifying:

Exhibit No.	Date/ Physician	Age/Height	FEV1	FVC	MVV	FEV1/FVC
MDX 9	112/05/2001 Baker	66 69"	2.57 (pre)	3.45 (pre)	91 (pre)	75%(pre)
MDX 12	01/25/2002 Hussain	66" 68"	2.67 (pre) 2.85 (post)	3.40 (pre) 4.15 (post)	68 (pre)	78.5%(pre) 69% (post)
MDX 49	08/14/2003 Dahhan	67 67.25"	2.57 (pre) 2.66 (post)	3.25(pre) 3.29 (post)	63 (pre) 69 (post)	79%(pre) 81%(post)

Thus, Claimant cannot establish the Miner's total pulmonary or respiratory disability based upon the PFTs under 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies. Under subparagraph (ii) of section 20 C.F.R. §718.204(b)(2), total disability is established if the arterial blood gases show the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix C for the appropriate altitude.

The following ABG test results (all taken at rest except for the 2002 (DOL) test, which was also taken at exercise) were submitted as evidence for Miner's current claim, none of which were qualifying:

Exhibit No.	Physician	Date	PCO2	PO2	Qualifying?
MDX 9	Baker	12/05/2001	32 (R)	98 (R)	No
MDX 11	Hussain	01/25/2002	30.9 (R) 31.8 (E)	92 (R) 89 (E)	No No
MDX 49	Dahhan	08/14/2003	36.2 (R)	97.8 (R)	No

Thus, Claimant cannot establish total disability based upon the ABGs under section 718.204(b)(2)(ii).

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure in the new evidence, so Claimant has not established the Miner's total disability under section 718.204(b)(2)(iii) based upon the new evidence.

Medical opinion evidence on total disability. Despite my conclusion that none of the above tests establish the Miner's total disability prior to his death, Claimant can still prove disability if she can show through reasoned medical opinions, based upon medically acceptable diagnostic techniques, that a respiratory or pulmonary condition resulted in an impairment that prevented the Miner from performing his last or usual coal-mining duties or comparable work . *See* 20 C.F.R. §718.204(b)(1), (b)(2)(iv). Four physicians (Drs. Baker, Hussain, Dahhan, and Rosenberg), all of whom are board-certified in internal medicine and the subspecialty of pulmonary diseases, offered opinions regarding the Miner's disability during his lifetime in the current claim:

(1) Dr. Glen Baker, a board-certified pulmonologist,[8] examined the Miner on December 5, 2001. (MDX 9). Dr. Baker did not find the Miner to be totally disabled. Rather, he noted that the Miner had a normal pulmonary function test and normal arterial blood gas studies, and he opined that the Miner had a "Class 1 impairment with the FEV1 and vital capacity both being greater than 80% of predicted." *Id.* However, he went on to say:

> Patient has a second impairment based on the presence of pneumoconiosis, based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

[8] As used herein, a board-certified pulmonologist is a physician who is board-certified in internal medicine and the subspecialty of pulmonary diseases.

(MDX 9) Dr. Baker noted the minimal, remote smoking history and opined that any pulmonary impairment was "caused at least in part, if not significantly so, by his coal dust exposure." *Id.*

(2) Dr. Imtiaz Hussain, a board-certified pulmonologist, conducted the pulmonary examination for the Department of Labor on January 25, 2002. (MDX 10). He took a history and conducted a physical examination. For the diagnostic testing, he stated that the chest x-ray, vent study (PFS), arterial blood gas, and EKG performed on January 25, 2002 were all "Normal." *Id.* In the section of the form asking for Cardiopulmonary Diagnoses, he stated "None" and he placed a dash in the section relating to Impairment. In a supplemental one page form, he indicated, by checking the appropriate box, that the Miner did not have an occupational lung disease that was caused by his coal mine employment and, when asked to categorize the extent of his pulmonary impairment, he checked the box for "No impairment." *Id.* He provided no other discussion or analysis of the disability issue.

(3) Dr. Abdul Dahhan, a board-certified pulmonologist, examined the Miner on August 25, 2003. (MDX 49). Based on an occupational, clinical, radiological and physiological evaluation, he opined that the Miner had "no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure as demonstrated by the normal clinical examination of the lungs, normal arterial blood gases, normal spirometry and negative x-ray reading for pneumoconiosis." *Id.* Based upon his overall evaluation of the Miner, he opined that he "retain[ed] the respiratory capacity to continue his previous coal mining work or job of comparable physical demand with no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." *Id.* However, he went on to note that the Miner had rheumatoid arthritis, hypertension, coronary artery disease, non-insulin dependent diabetes mellitus, and hyperlipidemia, none of which were related to his inhalation of coal dust or coal workers' pneumoconiosis. *Id.*

(4) Dr. David Rosenberg, a board-certified pulmonologist and occupational medicine specialist, reviewed the records and prepared a report dated November 7, 2005, after the Miner's death. (EX 2). The report included two parts, the first of which addressed the Miner's claim and was based upon evidence in that claim. Dr. Rosenberg noted the Miner's other health problems. However, he stated that the Miner's pulmonary function tests overall were normal, when taking into account his "poor efforts in performing the spirometric maneuvers" and his blood gases were normal at rest and with exercise. He noted that there were both positive and negative x-ray readings, but he opined that the normal exercise blood gases found by Dr. Hussain suggested that "his interstitium was not chronically scarred consequent to past coal dust exposure." *Id.* Finally, on the issue of disability, Dr. Rosenberg stated:

> From a functional perspective, [Miner] had no significant obstruction or restriction. Also, he had normal oxygenation, as described. Consequently, he was not considered disabled from a pulmonary perspective in performing his previous coal mining job.

(EX 2).

Thus, of the four physicians rendering opinions, three (Drs. Hussain, Dahhan, and Rosenberg) found him not to be totally disabled on a pulmonary or respiratory basis while the fourth (Dr. Baker) suggested that he was disabled. However, upon analysis of Dr. Baker's opinion, it is clear that it does not constitute a reasoned medical opinion, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that the Miner's respiratory or pulmonary condition prevented him from engaging in his previous coal mine employment or comparable work, as required by 20 C.F.R. §718.204(b)(2).

Despite Dr. Baker's statement that the Miner's need to limit exposure to coal dust "would imply" he is "100% occupationally disabled," an opinion that a miner should not work in a dusty environment does not constitute a total disability finding. In this regard, a finding that a miner should avoid occupational exposure is more in the nature of a medical recommendation based upon health concerns than a statement that a miner lacks the pulmonary or respiratory capacity to perform the required work; it is therefore insufficient to establish total disability from a pulmonary or respiratory condition. *See Taylor v. Evans and Gambrel Company, Inc.*, 12 BLR 1-83 (1988) (advice that a miner should avoid dusty situations is not tantamount to a finding of total disability due to pneumoconiosis). *See also Zimmerman v. Director, OWCP,* 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (recommendation that miner not return to underground coal mining because of his silicosis is not equivalent to a finding of total disability). *But cf. White v. New White Coal Col, Inc.,* 23 B.L.R. 1-1 (2004) (upholding administrative law judge's finding of no total disability despite giving probative weight on disability issue to opinion by Dr. Baker similar to that involved here).

In view of the above, I find that the preponderance of the new medical opinion evidence does not support a finding that the Miner was totally disabled from a pulmonary or respiratory standpoint during his lifetime. Claimant cannot therefore establish total disability under 20 C.F.R. §718.204(b)(2)(iv).

Conclusion

Considering all of the evidence under section 718.204(b)(2), as compared with the requirements of his last coal mine job (operating a bulldozer and high lift and performing other work in a surface mine, including loading coal), I find that Claimant has not established that the Miner was incapable of performing his job on a pulmonary or respiratory basis prior to his death. While any coal mine job undoubtedly requires significant effort, it has not been shown that the Miner's coal mine employment was particularly strenuous or heavy. (MDX 6 [Description of Coal Mine Work]; MDX 51 [Miner's testimony]; MDX 1 [Miner's testimony]). More importantly, it has not been shown that the Miner was incapable of performing even heavy labor on a pulmonary or respiratory basis during his lifetime.

As the Claimant cannot show that the Miner was totally disabled on a pulmonary or respiratory basis prior to his death, she cannot establish a change in the condition of entitlement upon which the previous denial was premised (total disability). Accordingly, the Miner's claim must be denied under 20 C.F.R. §725.309(d) based upon the previous denial and it is unnecessary to consider any other issues with respect to the Miner's claim.

Widow's Claim

To establish entitlement to benefits as an eligible survivor of a miner whose death was due to pneumoconiosis, a claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. § 718.205(a). As with respect to the Miner's claim, the Claimant must establish each element of her claim by a preponderance of the evidence, and if the evidence is evenly balanced, the claimant must lose. *See Greenwich Collieries, supra.*

Since this survivor's claim was filed after January 1, 1982, the issue of death due to pneumoconiosis is governed by 20 C.F.R. § 718.205(c). As amended in December 2000 (when subsection (5) was added), section 718.205(c) provides:

> (c) For the purpose of adjudicating survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:
>
> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
>
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
>
> (3) Where the presumption set forth at § 718.304 [relating to complicated pneumoconiosis] is applicable.
>
> (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
>
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. § 718.205(c). Under existing precedent in the Sixth Circuit (and elsewhere), consistent with new subsection (5), any condition that hastens a miner's death is a substantially contributing cause of death. *Griffith v. Director, OWCP,* 49 F.3d 184 (6th Cir. 1995); *see also Brown v. Rock Creek Mining Co.*, 996 F.2d 812 (6th Cir. 1993); *Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 757-62 (4th Cir. 1999). Thus, the standards are the same under the new and old regulations. *See Mills v. Director, OWCP,* 348 F.3d 133 (6th Cir. 2002) (applying hastening death standard post regulation adoption).

In view of the above, I will first consider whether the Claimant has established that the Miner had pneumoconiosis and whether she has shown that it arose from his coal mine

employment and then consider whether she has established that it caused, contributed to, or hastened his death.

Existence of Pneumoconiosis

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical or clinical pneumoconiosis and statutory or legal pneumoconiosis. 20 C.F.R. §718.201. Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e*. the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. *Id*. Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment"; the regulations explain that "[t]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) . The section continues by stating that "'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id.* at §718.201(b).

The regulations provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. §718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting x-ray reports; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. §718.304 (or two other presumptions set forth in §718.305 and §718.306); or (4) a determination of the existence of pneumoconiosis as defined in §718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a) (1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests and procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. The United States Court of Appeals for the Sixth Circuit has often approved of the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis. *See Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc).

X-Ray Evidence. The x-ray evidence designated in the Widow's claim appears in the table below. Dr. Baker's reading of the December 5, 2001 x-ray appearing in DX 9 has been excluded because the x-ray could not be found to be reread. Dr. Alexander's rebuttal reading of an August 14, 2003 x-ray reading by Dr. Dahhan, listed as CX 5 on the designation evidence summary form (and appearing as MDX 52), was not offered or received into evidence as Dr. Dahhan's reading was not offered in connection with the Widow's claim; however, Dr. Alexander's rebuttal reading to an August 11, 2003 x-ray has been admitted as CX 1. Employer has indicated in its prehearing report (at page 10, footnote 10) that there is no x-ray from August 11, 2003 and the x-ray from Dr. Dahhan's examination, that was interpreted by Dr. Kendall for

the Employer, was taken on August 14, 2003. I accept that explanation.[9] The x-ray evidence for consideration in the Widow's claim therefore consists of the following:

Exhibit No./ Party Designating	**Date of x-ray/ Reading**	**Physician/ Qualifications[10]**	**Interpretation**
WDX 24 Employer	08/14/2003/ 12/15/2003	W. Kendall B/BCR	Completely negative. Film Quality 1.
CX 1 Claimant	08/14/2003 [misidentified as 08/11/2003]/ 01/03/2004	M. Alexander B/BCR	Pneumoconiosis, 1/2 profusion, six zones, p/q. Pleural abnormalities (plaque); "co" [cardiac size or shape abnormality]. Small calcified granulomas. Film Quality 2, underexposed.

Inasmuch as equally qualified readers disagreed as to whether the Miner's x-ray of August 14, 2004 showed evidence of pneumoconiosis, the evidence on this issue is in equipoise. Thus, the x-ray evidence neither supports nor undermines a finding of pneumoconiosis. As it is the Claimant's burden of proof, I find that Claimant has not established the presence of the disease under 20 C.F.R. §718.202(a)(1).

Autopsy or Biopsy Evidence. The autopsy evidence consists of the autopsy examination report by Peter R. Gale, M.D. (WDX 7). Dr. Gale reached the following final anatomic diagnosis:

I. Atherosclerotic heart disease.
   A. Severe atherosclerosis involving the left anterior descending coronary artery with greater than 90% luminal stenosis.
   B. Severe atherosclerosis involving the right coronary artery with up to 90% luminal stenosis.
   C. Severe atherosclerosis involving the left circumflex coronary artery with up to 80% luminal stenosis.
   D. Moderate atherosclerosis involving the left main coronary artery with up to 40% luminal stenosis.
   E. Old myocardial infarct, involving the left ventricular free wall.
   F. Cardiomegaly, 500 grams.

II. Changes that are compatible with simple coal worker's pneumoconiosis/ anthracosilicosis

[9] If Employer is incorrect, then the x-ray interpretation by Dr. Alexander appearing as MDX 52 should be considered as rebuttal evidence instead of CX 1. That interpretation, dated October 27, 2003, also found pneumoconiosis, p/q, six zones, 1/2 profusion, but noted "ax" (coalescence of small opacities), noted slightly different chest wall findings, and did not mention granulomas. (MDX 52).

[10] "B" denotes B-reader, "BCR" denotes board-certified radiologist.

III. Pulmonary edema.

IV. Aortic atherosclerosis moderate.

V. Pleural effusions, bilateral (right and left, 200 cc. and 100 cc. est., respectively).

(WDX 7). The Clinical History reflected that the Miner had been admitted on November 17, 2003 for evaluation of chest pain, after having been discharged several days before, and noted the following:

> On 11/18 the patient had a cardiac catheterization which disclosed approximately 40% stenosis of the left main coronary artery, approximately 100% stenosis/occlusion of the left anterior descending coronary artery, and approximately 90% stenosis of the left circumflex coronary artery. He was also found to have approximately 50% and 90% stenosis of the proximal to mid and the distal portions, respectively of the dominant right coronary artery artery [sic]. The option of coronary artery bypass graft surgery was discussed with the patient. The patient elected to have PCI (as opposed to coronary artery bypass surgery). During the afternoon hours of 11/20/03, the patient developed intermittent hypotension which is associated with chest pain and EKG changes. The patient was brought to the cath lab for an emergency PCI. The patient developed a respiratory arrest and bradycardia which required intubation. Despite aggressive attempts at resuscitation, the patient ultimately expired. Permission for an autopsy limited to the chest was granted by the wife of the deceased. . .

Id. The report went on to note External Examination, Internal Examination, and Microscopic Description. *Id.* Under the Microscopic Description of the Lungs, Dr. Gale stated:

> LUNGS: Sections of the right and left lungs disclose scattered accumulations of carbon-laden macrophages. These cellular collections have a predilection for peribronchial and perivascular location. Some of these cellular collections are also associated with areas of fibrosis. Within the fibrous foci is birefringent crystalline material which is suspected to represent silica. In scattered areas the alveoli contain edema fluid. Significant pneumonitis is not observed. Involvement of pulmonary parenchyma by malignancy is not noted. No pulmonary emboli are identified.

Id. In Summary, Dr. Gale stated: "It is believed that the patient's demise was principally related to his severe underlying atherosclerotic heart disease." *Id.* He also stated that the Miner's lungs "disclose changes that are compatible with simple coal workers' pneumoconiosis (anthracosilicosis)" but the findings did not "justify the appellation of complicated coal workers' pneumoconiosis." *Id.* He indicated that the Miner's pulmonary parenchyma were also reviewed by Dr. Gary Adelson who concurred with his interpretations. *Id.* Dr. Gale did not comment upon any possible contribution that the pneumoconiosis may have made to the Miner's death.

Thus, the autopsy prosector found that the Miner suffered from simple coal workers' pneumoconiosis. There were no other slide reviews by pathologists. Accordingly, Claimant has established the presence of the disease under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. As there is no evidence of complicated pneumoconiosis, the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306 are also inapplicable, *inter alia*, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 does not apply, because the miner did not die on or before March 1, 1978. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. The following physicians provided medical opinions addressing the issue of whether Claimant has pneumoconiosis with respect to the Widow's claim:

(1) Dr. Glen Baker, a board-certified pulmonologist, examined the Miner on December 5, 2001. (DX 9). He diagnosed coal worker's pneumoconiosis, based in part on his own x-ray interpretation, which has been excluded from evidence. He also diagnosed chronic bronchitis by history. He opined that the Miner's disease and pulmonary impairment were the result of exposure to coal dust, noting that the Miner had a minimal smoking history and had not smoked cigarettes for 31 years; therefore, "any pulmonary impairment is caused at least in part, if not significantly so, by his coal dust exposure." *Id.* Inasmuch as his opinion was rendered while the Miner was still alive, he did not consider or comment upon the autopsy evidence or opine as to the cause of death.

(2) Dr. Ben V. Branscomb, a professor emeritus, reviewed pertinent medical records and issued a report dated September 9, 2004.[11] (EX 1). Dr. Branscomb opined that the Miner had early simple CWP (coal workers' pneumoconiosis), based on the pathological description. However, he stated:

> There is no significant pulmonary impairment of any etiology. The objective pulmonary data, even on submaximal tests, confirm ample pulmonary function for bulldozer work or any other heavy labor. One would not expect any impairment from CWP as mild as described by Dr. Gale.
>
> There was a very long time interval between cessation of mining and the cardiac death. The record contains no clinical findings, function studies, nor x-ray findings to suggest any contribution toward a cardiac disease or death attributable

[11] In his report, Dr. Branscomb referenced some x-ray readings that are not of record in the Widow's claim and found the x-ray evidence to be equivocal. However, inasmuch as I have found the x-ray evidence to neither support nor undermine a finding of pneumoconiosis, and as Dr. Branscomb's report is not dependent upon, or inextricably intertwined with, the inadmissible evidence, I will strike the x-ray readings and consider the remainder of his opinion.

> to any pulmonary disease. The pathology also excludes a dust related contribution to the cause or timing of death.

(EX 1).

(3) Dr. David M. Rosenberg, a board-certified pulmonologist and occupational medicine specialist, prepared a two part report. The first part, discussed above, addressed the issue of the Miner's claim. The second portion addressed the Widow's claim. (EX 2). As noted above, he discounted the possibility of coal workers' pneumoconiosis in addressing the Miner's claim. However, with respect to the Widow's claim, he conceded based upon the autopsy report by Dr. Gale that the Miner had "a minimal degree of simple CWP, without micronodules or macronodules being described." *Id.* Dr. Rosenberg opined that the Miner's death was directly related to his severe underlying coronary artery disease, and he stated: "It is known that coronary artery obstruction leads to myocardial insufficiency, and if this is severe enough, infarction or death of cardiac tissue occurs; this is referred to as a 'heart attack' and can be associated with a fatal arrhythmia." *Id.* He also noted that given the blockage of the Miner's left anterior descending artery, "it was just a question of time" before he had a myocardial infarction leading to death. *Id.* As to the possible contribution by the Miner's coal mine employment history, he stated:

> With respect to the minimal degree of simple coal workers' pneumoconiosis (CWP) he was determined to have pathologically, it was predominantly of the macular form, without the presence of micronodules or macronodules. It is known that this minimal degree of CWP would not be associated with any significant ventilatory dysfunction (Cochrane and Morgan). Also, it would not be associated with micronodular changes as reported by Dr. Alexander. Undoubtedly, any CWP [Miner] had, did not cause, aggravate or hastened [sic] his death. Also, CWP is not a risk factor for the development of coronary artery disease, but is considered a disorder of the general public.

(EX 2). Dr. Rosenberg opined that the Miner's death was "consequent to coronary artery disease and complications thereof" and his death was not caused, contributed to, or hastened by his past coal mine employment or his minimal degree of simple CWP. *Id.*

Thus, the medical opinion evidence also supports a finding of clinical pneumoconiosis (the existence of which was conceded by all three reviewing physicians) but not legal pneumoconiosis. On the issue of legal pneumoconiosis, only Dr. Baker has made a diagnosis (chronic bronchitis) that he has associated with coal mine dust exposure, but he made that diagnosis by history alone. Neither Dr. Branscomb nor Dr. Rosenberg found the Miner to have suffered from bronchitis or COPD, and neither condition was found on autopsy. As noted above, Dr. Baker reached his opinion without the benefit of the autopsy report but Drs. Branscomb and Rosenberg were able to review it. Moreover, there is insufficient evidence of any measurable impairment caused by any condition. Thus, the preponderance of the medical opinion evidence does not establish that the Miner suffered from a chronic lung disease or impairment and its sequelae arising out of coal mine employment (legal pneumoconiosis) although it establishes that

the Miner had simple coal workers' pneumoconiosis (clinical pneumoconiosis). Accordingly, Claimant has established the presence of the disease under 20 C.F.R. §718.202(a)(4).

Other Evidence of Pneumoconiosis. The other medical evidence in the Widow's claim consists of the death certificate. It is unclear what physician signed the death certificate, because the signature is illegible except for the title "M.D." (WDX 6). The death certificate was signed on December 8, 2003 and indicated that the Miner died on November 20, 2003, at the age of 68. It lists the immediate cause of the Miner's death as "Myocardial Infarction" (of 12 hours duration) due to (or as a consequence of) "Coronary Artery Disease" of unstated duration. *Id.* The death certificate does not mention any other causative factors or other significant conditions. This conclusory document is of limited probative value. *See Bill Branch Coal Co. v. Sparks,* 213 F.3d 186 (4th Cir. 2000). *See also Smith v. Camco Mining, Inc.,* 13 B.L.R. 1-37 (1989); *Addison v. Director, OWCP,* 11 B.L.R. 1-68 (1988). It does not assist the Claimant in proving pneumoconiosis.

All Evidence on Pneumoconiosis. In view of the above, I find that the evidence establishes the presence of clinical pneumoconiosis under individual subsections (a)(2) and (a)(4) of section 718.202(a) as well as under the section as a whole. It is worth noting that the autopsy evidence is considered the most reliable indicator of whether a decedent suffered from simple coal worker's pneumoconiosis and here, it is undisputed that the autopsy evidence reflects that the Miner suffered from simple coal workers' pneumoconiosis. *See Terlip v. Director, OWCP,* 8 B.L.R. 1-363 (1985). *See also Peabody Coal Co. v. McCandless,* 255 F.3d 465 (7th Cir. 2001). However, as this case arises in the Sixth Circuit, a finding of pneumoconiosis under one of the sections is sufficient. *Furgerson, supra.* Accordingly, I find that the Claimant has established that the Miner had pneumoconiosis as defined by the regulations.

Causal Relationship with Coal Mine Employment.

Claimant is entitled to the presumption that the Miner's pneumoconiosis arose out of his coal mine employment under section 718.203(b). In this regard, it is undisputed that the Miner had at least 11 years of coal mine employment—in excess of the 10 years required for the presumption—and I have found that he suffered from pneumoconiosis. The presumption has not been rebutted.

Causation of the Miner's Death

The criteria for establishing that the Miner's death was caused by pneumoconiosis are set forth above. Essentially, a claimant must establish that pneumoconiosis caused the Miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, the death was caused by complications of pneumoconiosis, or pneumoconiosis hastened the miner's death. 20 C.F.R. § 718.205(c).

Extended discussion is unnecessary because there is essentially no evidence of record establishing that the Miner's death was caused, contributed to, or hastened by pneumoconiosis. The medical opinions of record are discussed above (with respect to pneumoconiosis), and none of them indicate that coal workers' pneumoconiosis caused, contributed to, or hastened the

Miner's death. Dr. Baker rendered his opinion before the Miner died while Drs. Branscomb and Rosenberg attributed the Miner's death to coronary artery disease and opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten his demise. Likewise, the autopsy report by Dr. Gale, while listing diagnoses including coal workers' pneumoconiosis, attributed the cause of death to the Miner's severe underlying atherosclerotic heart disease and did not mention any possible contribution by pneumoconiosis. The death certificate listed myocardial infarction due to coronary artery disease as the cause of death and did not mention any other factors or conditions.

In the absence of any evidence supporting a finding that pneumoconiosis caused, contributed to, or hastened the Miner's death, the Widow's claim must be denied, and it is unnecessary to consider any other issues.

ORDER

IT IS HEREBY ORDERED that the claim of D. S. for Black Lung benefits on behalf of R.S., deceased is **DENIED;** and

IT IS FURTHER ORDERED that the claim of D.S. for Black Lung survivor's benefits, as the surviving spouse of R.S. deceased, is **DENIED.**

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207.

Once an appeal is filed, all inquiries and correspondence should be directed to the Board. After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen H. Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S.

Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).